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Supreme Court of the United States

OCTOBER TERM 1937.

No. 242

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

(Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant, through Consul Careaga and Proctor Rosenberg, by order to show cause, after final decree entered, why the decree should not be vacated so that he might be permitted to appear as claimant,

Respondent in this Court.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
JAMES W. RYAN,
Proctors for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",
Petitioner,

—against—

(Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant, through Consul Careaga and Proctor Rosenberg, by order to show cause after final decree entered, why the decree should not be vacated so that he might be permitted to appear as claimant,

Respondent in this Court.

Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Compania Espanola de Navegacion Maritima, S. A., owner of the SS. "Navemar" for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of Matter Involved.

This is a proceeding in admiralty, begun by the filing of a libel for possession of the steamship "Navemar" in the United States District Court for the Eastern District of New York. The libel was *in rem* against the steamer and *in personam* against five individual members of the crew employed and paid by the petitioner, who had risen against the owner and master of the vessel, disputed their authority and denied them access to the vessel.

Although no claim to the vessel was filed and no appearance was entered by any of the individual respondents, the District Court proceeded to hear the case in open court and took the testimony of the master and officers of the vessel and the President of this petitioner, the owner of the vessel. After a full hearing, extending over a period of three days, the District Court entered a final decree on December 14, 1936, ordering the Marshal to deliver possession of the vessel to this libellant. This decree was executed on the same day, as appears from the return of the Marshal (R., p. 142). Two days later an application was filed by one Luis Careaga, describing himself as an Acting Spanish Consul General of the Republic of Spain, and purporting to act on behalf of the Spanish Ambassador, to have the vessel delivered to him. This application was rejected by the District Court and the appeal from its order on this point was dismissed by the Circuit Court of Appeals on motion (see order of March 4, 1937, R., pp. 313-314).

The Spanish Ambassador had endeavored to enlist the aid of the Department of State, but that Department, on December 11, 1936, finally declined to inter-

vene and referred the Ambassador to the courts (R., pp. 361, 362; *cf.* R., pp. 15, 19, 23).

On January 8, 1937, an order to show cause was obtained by "Jesse L. Rosenberg, Proctor for Fernando de los Rios, Ambassador of the Republic of Spain" (R., p. 178) why the final decree should not be vacated, and why the Ambassador "should not be permitted to appear as claimant" of the vessel (R., p. 179). This application was denied by the District Court in its order of February 3, 1937 (R., p. 274) pursuant to a written opinion filed on January 28, 1937 (R., p. 257). An appeal from that order was allowed by a Judge of the Circuit Court of Appeals; and the appeal from that order was the only matter before the Circuit Court of Appeals when the cause came on for argument in that Court. Nevertheless, the Circuit Court of Appeals not merely vacated the final decree and granted the request of the Ambassador that he be permitted to enter an appearance "as claimant", but went further and dismissed the libel, saying:

> "The claim of this public control is borne out by the Ambassador's suggestion and his desire to intervene. The allegations of the suggestion we are bound to accept as conclusive" (R., p. 335).

The foregoing passage from the opinion below shows very clearly one of the points on which the petitioner seeks a review by this Court. The Spanish Ambassador seems to have understood correctly his legal position, and he offered to appear as a litigant and submit proof in support of his claim. The Circuit Court of Appeals, however, treated the Ambassador's statements as conclusive and as rendering evidence

unnecessary, notwithstanding they were contradicted by a mass of evidence taken in the District Court. This petitioner applied for a reargument in the Circuit Court of Appeals, but that application was denied (R., pp. 339, 357).

The libellant is a corporation created under the laws of Spain, but, as found by the District Court, "was domiciled, so far as domicile is possible to a corporation, in the United States, with its affairs directed and controlled by its agents resident in the United States" (R., p. 271). The steamship "Navemar" was under the Spanish flag, being registered in the port of Seville, Spain, which was not at any of the times material to this case, under the jurisdiction or control of the Madrid Government. For a number of years the "Navemar" had been owned and operated by the libellant. At no time during the period material to this litigation had the "Navemar" been in any Spanish port or within any Spanish territorial waters.

At all material times she was under charter to Linea Sud-Americana, Inc., a New York corporation, and was engaged in the transportation of commercial cargoes between New York and South American ports pursuant to that charter. At the time of the events which gave rise to the present litigation the charter still had six months to run.

While the "Navemar" was in Argentine waters on a voyage which she was making pursuant to the above charter, the Spanish Consuls at Rosario and at Buenos Aires, without the consent of the shipowner or master, endorsed on two of the vessel's documents (not including the bill of sale or any document of title) a statement that the property in the vessel had passed to the Spanish Government by

a decree issued in Madrid on October 10, 1935, by the President of Spain. This decree was issued *ex parte.*

There is no evidence in the record excepting the bare statement of Careaga (R., p. 188), as to the effect of the Spanish decree even under the laws of Spain; nor is there any evidence as to what, if any, effect the endorsement on the ship's papers had under the law of the Argentine Republic or under the law of Spain. The endorsement was not accompanied or followed by any attempted or purported change in the physical possession of the vessel. On the contrary, the master was told that no instructions whatever had been received from the Spanish Government by the Spanish Consuls as to any change in the possession or employment of the vessel, and they interposed no objection to his continuing with the performance of his charter.

When the vessel arrived in the port of New York she was laden with a general commercial cargo consigned to various American consignees. This cargo was delivered and the freight was collected by the master on behalf of the charterer and paid over by him to the charterer. At no time was any objection made by any one to this course of procedure.

In the course of its opinion holding that the decree of October 10, 1936 issued in Madrid was without effect to transfer ownership or right of possession from the shipowner domiciled in this country and holding actual possession of its vessel here, the District Court mentioned the decision of the Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Belmont,* 85 F. (2d) 542, but pointed out that the doctrine of that case was not necessary to the decision of the present case. The Circuit Court of Appeals decided the present case after

United States v. *Belmont* had been reversed by this Court on May 3, 1937. Without commenting upon the District Court's construction distinguishing that case, the Circuit Court of Appeals held in effect that a decree of confiscation is effective as against a vessel flying the flag of the sovereign which has issued the decree of confiscation, no matter where she may be (whether or not within the territorial limits of another sovereign, and whether or not the owner of the vessel is permanently domiciled in the territory of such other sovereign and has the vessel in his actual possession there). Proceeding from this premise, the court reached the conclusion that the "Navemar" was the property of the Spanish Government by virtue of the confiscatory decree of October 10, 1936, notwithstanding the fact that the vessel had never been within the territorial limits or jurisdiction of Spain since the decree was issued. As we shall show in the attached brief, the decision of this Court in *United States* v. *Belmont,* upon which the Circuit Court of Appeals relies (R., p. 335), does not require or authorize such a holding.

Contrary to the conclusion of the District Court (R., p. 172), the Circuit Court of Appeals held that a ship only *constructively possessed* by a sovereign is immune from judicial determination (R., p. 336). To reach this conclusion, the Circuit Court of Appeals stated a new principle of law squarely in conflict with the decision of this Court in *The Davis,* 10 Wall. 15, at page 21.

The Circuit Court of Appeals itself recognized that its present decision was in conflict with the weight of authority, in conflict with the decision of this Court in *The Davis,* 10 Wall. 15, and in conflict with the decision of the Circuit Court of Appeals

for the Fourth Circuit in *The Attualita,* 238 Fed. 909. It said (R., p. 336):

> "Having dedicated the vessel to the public service by subjecting it to its control, the Spanish Government must be regarded as at least in constructive possession of her, which for the purposes of immunity, is as efficacious as actual possession through the Government's own officers. *The Roseric,* 254 Fed. 154; *The Adriatic* 258 Fed. 902; *The Jupiter* (*No. 1*) (1924) P. 236; Hyde Sec. 256; *Contra, The Attualita,* 258 Fed. 909 (C. C. A. 4); *Long* v. *The Tampico,* 16 F. 491 (D. N. Y.); and see *The Carlo Poma,* 259 Fed. 369; *The Beaverton,* 273 F. 539. *Cf. The Johnson Lighterage No. 24,* 231 Fed. 365; *The Davis,* 10 Wall. 15."

We shall show in the attached brief that *The Roseric* and *The Jupiter,* cited in this passage, do not support the proposition for which they are cited; and that "The Adriatic" also cited, is distinguishable, and if assumed to be in point has been overruled by this Court in *Ex parte Muir,* 254 U. S. 522.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(*1*) The decision of the Circuit Court of Appeals directing that the libel be dismissed merely on a suggestion, without proof, when the suggestion is not made by an official of the United States, is a decision on an important question of maritime and international law in a way which is in conflict with applicable decisions of this Court in *Ex parte Muir,* 254 U. S. 522, and in *The Pesaro,* 255 U. S. 216. Moreover, on principle, a private suitor cannot be

denied the protection of the courts on the bare statement of persons unknown to the courts, even though such persons may in fact be the spokesmen of a foreign sovereign. Such a denial can only be based on a suggestion from the sovereign by which the Courts are created or by legal proof adduced in the ordinary way. This principle illustrates the importance of the distinction between actual and constructive possession. Any interference with property in the actual possession of a sovereign is in effect an attack on the sovereign, and the proper remedy is an application through diplomatic channels to the sovereign in whose territory the attack is threatened. On the other hand, a sovereign who seeks to obtain possession, within the territorial limits of another power, of property which has never been in its actual possession, must prove its title and right to possession like any other suitor.

The present case has not proceeded along either of the lines above described. Our state Department has declined to intervene, no doubt recognizing the impropriety of permitting itself to be used as a means of seizing property which has never been in the possession of the Spanish Government. Having deliberately refrained from becoming a party to the present litigation, in the hope of accomplishing its purpose through diplomatic channels, the Spanish Government comes in nearly a month after the final decree has been entered and asks that the court set aside its decree in order to give the Spanish Government an opportunity to challenge its jurisdiction. The refusal of the District Court to grant this application might well be sustained on discretionary grounds, quite apart from the merits of the case. The Circuit Court of Appeals, however,

not content with granting this extraordinary request of the Spanish Government, not merely sets aside the decree but dismisses the libel, although no application for such relief was before it.

This petitioner applied for a reargument and called the attention of the court to the fact that it had dealt with a question which was not before it (R., p. 339); but this application was denied (R., p. 357).

The extraordinary character of the decree of the Circuit Court of Appeals is emphasized by the fact that this proceeding was begun by the petitioner to oust from the vessel a group of men who had risen against the master and excluded him from any control over her. The Circuit Court of Appeals regarded the master as the individual who held "constructive" possession for the Spanish Government; and yet this proceeding by this petitioner was begun to reinstate him in possession and control. And even then his possession and control was secondary to that of the marshal, who had the vessel under attachment in another proceeding (R., p. 356). Until the mutineers were ousted the respondents apparently were glad to stand by and await the outcome; they now accept the fruits of the proceeding and at the same time challenge the court's jurisdiction. Moreover, if, as the Circuit Court of Appeals holds, the master was holding "constructive" possession for the Republic of Spain, he was doing so unwittingly because he testified (R., pp. 24, 100, 103, 104; and see also, Chief Officer Gomez, R., pp. 65, 63, 61) that he was at all times holding possession for this petitioner, who was the owner and still employing him and the crew, and paying them wages (R., pp. 327, 328) for services in connection with an unexpired charter party to an American commercial corporation.

We respectfully submit that if this decision stands the whole law of sovereign immunity will have been rewritten.

(*2*) The decision of the Circuit Court of Appeals for the Second Circuit in the present case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909 (C. C. A. 4). This conflict was expressly admitted by the Circuit Court of Appeals for the Second Circuit in its opinion in the present case as follows (R., p. 336):

> "Having dedicated the vessel to the public service by subjecting it to its control, the Spanish Government must be regarded as at least in constructive possession of her which, for purposes of immunity, is as efficacious as actual possession asserted through the Government's own officers. *The Roseric, supra; The Adriatic, supra; The Jupiter* (1924), p. 236; Hyde, *supra,* Sec. 256; *Contra, The Attualita,* 238 Fed. 909 (C. C. A. 4); *Long* v. *Tampico,* 16 F. 491 (D. N. Y.)."

(*3*) The decision of the Circuit Court of Appeals in the present case that Mr. Careaga, the Acting Consul General of Spain at New York, was clothed with diplomatic authority by the alleged power of attorney (R., pp. 363-366) is in conflict with the applicable decisions of this Court in *The Anne,* 3 Wheat. (U. S.) 434; *The Sao Vicente,* 260 U. S. 151; *Terlinden* v. *Ames,* 184 U. S. 270, at page 288; and *Doe ex dem. Clark* v. *Braden,* 16 Howard (U. S.) 635, at page 656, where this Court held that it is for the Executive Department of the Government, rather than the Judicial Department, to determine who represents a foreign government. (See also, fol-

lowing those decisions of this Court, *State of Russia* v. *National City Bank of New York*, 69 Fed. 2nd 44, at p. 47).

(4) The decision of the Circuit Court of Appeals in the present case that immunity of property of a sovereign depends on ownership, constructive possession (R., p. 336), dedication (R., p. 336), or being "subject" to jurisdiction or control (R., pp. 335 and 336), is in conflict with the applicable decisions of this Court in *The Davis*, 10 Wall. (U. S.) 15, and in *Ex parte Muir*, 254 U. S. 522, at page 532, that "merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way"; and with the long-settled maritime law of the United States as followed, for example, in *The Carlo Poma*, 259 Fed. 369, at page 370,

> "that immunity of property of a sovereign depends, not merely upon ownership but also upon actual possession".

(5) The decision of the Circuit Court of Appeals in the present case that a decree of confiscation by a sovereign is effective to transfer ownership and right of possession of a vessel which is within the territorial limits of another sovereign, and in the private owner's possession there, is a decision on an important question of general law and maritime law which is untenable and in conflict with the weight of authority and with the decisions of the admiralty courts in other maritime nations, and is specifically

in conflict with the decision of the Court of Appeal in England sitting in admiralty in *The Jupiter No. 3* (1927), Probate 250, and with the decision of the Belgian courts in *Maritarena* v. *Amaliogeta and Urutia* (Translation of opinion annexed to our brief).

(*6*) The decision of the Circuit Court of Appeals in the present case, to the effect that a vessel which has been dedicated to public service is immune from process, although the sovereign does not actually possess her, and although there is no evidence that she is being used for public purposes, is in conflict with applicable decisions of this Court in *Ex Parte Muir,* 254 U. S. 522, and in *The Davis,* 10 Wall. 15. It is also a decision on an important question of general law which is in conflict with the weight of authority, as shown by the contrary decisions in *The Jupiter,* L. R. 1924 Probate 236, at page 241, 369; *Long* v. *The Tampico,* 16 F. 491 (Addison Brown, *J.*); *The Beaverton,* 273 Fed. 539; and *The Johnson Lighterage No. 24,* 231 Fed. 365 (D. N. J.).

WHEREFORE, petitioner prays that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled *Compania Espanola de Novegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", Libellant-Appellee* v. *Spanish Steamship "Navemar", her engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanches, Respondents,* (*Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant*), 1936, October

Term, No. 401, and that the decision of the said Circuit Court of Appeals entered on the 7th day of June, 1937 (R., p. 330) and ordered entered on the 14th day of June, 1937 (R., p. 355), be reversed, and for such further relief in the premises as may be just.

Dated, New York, N. Y., July 23, 1937.

COMPANIA ESPANOLA DE
NAVEGACION MARITIMA, S. A.

By: D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
JAMES W. RYAN,
Proctors for Petitioner.

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Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, *et al.*,

and

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain,

Respondent in this Court.

BRIEF FOR PETITIONER.

Opinions Below.

The opinions below are officially reported as *The Navemar* (E. D. N. Y.), 18 Fed. Supp. 153 (see, also, 17 Fed. Supp. 495), 1937 American Maritime Cases 26 (see also p. 22), printed in the Record at pages 257 and 166; and *The Navemar* (C. C. A. 2), not yet officially reported, printed in the Record at page 330.

Jurisdiction of This Court.

The jurisdiction of this Court is under Section 240 of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, Clause 1 of the Constitution of the United States.

The decree of the Circuit Court of Appeals that the libel be dismissed on the ground that the District Court was without jurisdiction is a final decree, *The Pesaro,* 255 U. S. 216, at page 217.

The Facts.

The facts are stated in the foregoing petition and will not be repeated here. We will merely supplement the petition by quoting the following findings in the opinion of the District Court (R., pp. 270, 271), which are established by the uncontradicted evidence:

> "Baldly, the question presented is whether a foreign nation can by edict confiscate property not within its sovereign domain nor otherwise within its possession or control, seize such property within the sovereign domain of another power and claim immunity from suit in the courts of such latter nation. In all reason the answer to such question must be in the negative.
>
> Moreover, the position of the present claim need not rest on such broad though controlling base. For the reasons set forth in the opinion denying the former application this application must also be denied. The steamship 'Navemar' was not an armed vessel, was not a vessel in the public service of the Republic of Spain, was not possessed by the Republic of Spain nor operated by it. From the time of the edict of October 10, 1936, to the time of the illegal seizure by a committee of the crew in the waters of New York Harbor, the ship was manned by officers and all

members of the crew in the employ of the libellant. The vessel was under charter to the Linea Sud-Americana, Inc. On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterer. * * * Proof, however, shows that this corporation was domiciled, so far as domicile is possible to a corporation, in the United States, with its affairs directed and controlled by its agents resident in the United States."

I.

The decision of the Circuit Court of Appeals for the Second Circuit in the present case that the libel must be dismissed for want of jurisdiction because of allegations of fact contained in a suggestion made directly to the Court by a private lawyer or consul allegedly representing a foreign Government or Ambassador, and not through the Attorney General or Secretary of State or other official channel of the United States, is in conflict with applicable decisions of this Court in *The Pesaro*, 255 U. S. 216, 218-219, and in *Ex parte Muir*, 254 U. S. 522, 532, and if permitted to stand will confuse the procedure in all cases where property in this country is claimed by a foreign sovereign.

As stated in the petition, the only question which was before the Circuit Court of Appeals concerned the denial by the District Court of the application of Luis Careaga, Acting Consul General of the Republic of Spain, alleged to be specially clothed with diplomatic authority to make the application on behalf of the Spanish Ambassador, to intervene and file a claim in these proceedings on behalf of the Republic of

Spain. The court below, instead of granting the relief prayed for, directed that the libel be dismissed on the ground that the court below had no jurisdiction. It based its ruling on a so-called suggestion filed by Careaga and the facts contained therein. But even if the Careaga affidavit be treated as a suggestion, it was insufficient, because, as was said in *The Pesaro,* 255 U. S. 216, at pages 218 and 219, where the facts relied upon to support the claim for immunity are not considered and determined by the Executive Department, and placed before the Court through an official channel of the United States Government, such facts must be alleged and established by evidence by the foreign Government as a party to the cause. This Court in the *Pesaro* case said (255 U. S. at pp. 218 and 219):

> "Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status, it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libellants' objection that, to be entertained, the suggestion should come through official channels of the United

States was well taken. *Ex parte Muir,* 254 U. S. 522."

The action of the Court in the present case in treating the allegations in the unofficial suggestion as proved, and in directing that the cause be dismissed for want of jurisdiction, is squarely in conflict with the decision of this Court in *The Pesaro, supra.* We submit that in any event the Circuit Court of Appeals had no power other than to direct the District Court to permit the Republic of Spain to intervene and to offer proof as to its ownership of the "Navemar". After the decision in *The Pesaro,* 255 U. S. 216, the Italian Government submitted itself to the jurisdiction of the Court—*Berizzi* v. *Steamship Pesaro,* 271 U. S. 562; and, recognizing that it must establish as a fact that it was the owner of the S. S. "Pesaro", the Italian Government sought and obtained a stipulation from the libellant in that case establishing that fact. Obviously, if the question of ownership or possession is in dispute, under these decisions, ownership or right to possession must be proved like any other fact, and the failure of the court below to require such proof introduces a new doctrine into our law which is in conflict with the long-settled practice which this Court has held must be followed.

In *Ex parte Muir,* 254 U. S. 522, at 532 this Court said:

> "As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire,* 11 Wall. 164, 167; *The Santissima Trinidad,* 7 Wheat. 283, 353; *Colombia* v. *Cauca Co.,* 190 U. S. 524. Or, with its sanction,

its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne,* 3 Wheat. 435, 445-446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this Government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange,* 7 Cranch. 116; s. c. 16 Fed. Cas. No. 8,786; *The Pizarro,* 19 Fed. Cas. No. 11,199; *The Constitution,* L. R. 4 P. D. 39; *The Parlement Belge,* L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197.

"But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiae,* and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited); and in our opinion the libelant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States* v. *Lee,* 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it."

II.

Actual possession and not constructive possession is necessary under the law of the United States to permit a foreign government to claim immunity in respect of property owned by it, and the decision of the Circuit Court of Appeals that constructive possession is sufficient is without precedent and is in conflict with the decisions of this Court.

In *Ex parte Muir,* 254 U. S. 522, at page 532, this Court said:

> "*Prima facie the District Court had jurisdiction of the suit and the vessel, The Belgenland,* 114 U. S. 355, 368-369, *and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough.* These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. They were not specially within the knowledge of the libelant, nor did it have any superior means of showing the real facts. Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge." (Italics ours.)

That employment in the service of the State must be shown is well settled, see *Ex Parte State of New York,* 256 U. S. 503, where this Court said (at p. 510):

> "By the law of nations, a vessel of war owned

by a friendly power *and employed in its service* will not be subjected to admiralty process; and this upon general grounds of comity and policy. *Schooner Exchange* v. *McFadden,* 7 Cranch. 116, 144-147." (Italics ours.)

And see also *Long* v. *The Tampico,* 16 Fed. 491 (Southern District of New York), where Judge Addison Brown said, at pages 493 and 494:

> "The elaborate and exhaustive examination given to the subject of the exemption of the property of a sovereign power in the cases of *The Exchange,* 7 Cranch. 117; *Briggs* v. *Lightboats,* 11 Allen (Mass.) 157; and *The Parlement Belge* (1880), on appeal (5 Prob. Div. 197), renders superfluous any further examination of the general principles involved. These cases fully sustain the general proposition that the property of a government, *while in its possession and employed in or devoted to the public use,* is exempt from judicial process, on the ground that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority and the necessities of the public service. In the late case of *The Fidelity,* 16 Blatchf. 569, * * * Waite, *C. J.,* says: * * *
>
> > *'Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use,* and must be employed in carrying on the operations of the government.' "
> > (Italics ours.)

All that can be said here is that there was an allegation by Careaga that *it was intended* that the vessel should be used in the public service (R. 187).

Certainly the allegations here were no stronger than they were in *Ex Parte Muir,* 254 U. S. 522, and if the allegations were not enough in *Ex Parte Muir,* we submit that they were not enough here. If they were not in the range of judicial notice in *Ex Parte Muir,* how can they be in the range of judicial notice here? In other words, to sustain the decision below, we must abandon the salutary rule laid down in *Ex Parte Muir* as to what a foreign Government must show in order to establish immunity, and the rule in *Ex Parte State of New York,* 256 U. S. 503, which requires that the vessel shall be employed in the service of the State before she is immune.

The Circuit Court of Appeals, as we pointed out in the petition, has held that if a foreign sovereign issues a decree confiscating a vessel, so that the vessel becomes the property of the sovereign, then although the vessel is on the high seas or in foreign territorial waters, actual possession is not necessary to clothe the vessel with immunity, and that constructive possession is sufficient possession for that purpose (R., pp. 335, 336). This holding of the Circuit Court of Appeals is in sharp conflict with its own previous holding in *The Carlo Poma,* 259 Fed. 369, where that Court said:

> "The law of the United States is the same except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon *the actual possession* by this sovereign of the property at the time process is served. *The Davis,* 10 Wall. 15; *Long* v. *The Tampico,* 16 Fed. 49; *The Attualita,* 238 Fed. 909." (Italics ours.)

The Carlo Poma was reversed but on other grounds—see 255 U. S. 219.

The language of *The Carlo Poma* was cited and approved in *The Beaverton,* 273 Fed. 239.

The decision is also squarely in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909, and with the decision of this Court in *The Davis,* 10 Wall. 15. See, also, the decision of Judge Addison Brown in *Long* v. *The Tampico,* 16 Fed. 49; also *Johnson Lighterage No. 24,* 231 Fed. 365. It was decided in all of these cases that actual possession is necessary in order to clothe a vessel with immunity.

During the course of its opinion, the Circuit Court of Appeals stated that the master of the "Navemar" had recognized that he held possession of the vessel for the Spanish Government. It is respectfully submitted that this statement is in conflict with the testimony both of the master and of the chief officer of the vessel (R., pp. 24, 61, 63, 65, 100, 103, 104) and even if it were true, it would be wholly immaterial. Mr. Justice Hill discusses the relation of a master to his owners and to his ship, particularly as to whether a master has any legal right to vest possession of the vessel in any person. *The Jupiter No. 3* [1927] Probate 122. Mr. Justice Hill reached the conclusion that the master was merely a custodian, that he had no legal right to vest possession in any person, and that the custody of the master is for the legal owner. It cannot be disputed that *prima facie* the legal owner here was the libellant, petitioner. It held a bill of sale (*Hozey* v. *Buchanan,* 16 Peters 215, at pp. 219 and 220). Endorsement on the register or ship's roll does not affect ownership, as a ship's

register is insufficient to show ownership. *National Oil Transport Co.* v. *United States,* 18 Fed. (2d) 305).

The Circuit Court of Appeals assumed that the master had placed himself at the disposal of the Spanish Consulate at Buenos Aires and that that was important (R. 336), and it cites (R. 336) *The Jupiter* (1924), Probate Div. 236, in support of the proposition that constructive possession is sufficient. It overlooked the fact commented upon in *The Jupiter* case, that the Soviet Government at the time of the first seizure had "actual possession" (1924) Probate at page 241, and (1927) Probate at page 129. In the present case, however, Captain Martinez never permitted the Spanish Government to take actual possession of his ship. Consequently, the Spanish Government was never in possession, because, notwithstanding whatever Martinez may have said concerning his custody, the custody of Martinez was for the owner, the libellant below and the petitioner here. For, as was said by Hill, *J.* (1927), Probate at page 135:

> "It follows that the custody of Captain Lepine was for M. Bourgeois, as it had previously been for Maitre Pelen. Captain Lepine was under the orders of and paid by the administrator for the time being, and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages, who else could have dismissed him? If he had incurred liabilities for necessaries on account of the ship, who else but the administrator would have been liable *in personam*?
>
> The result of these considerations is that in March, 1924, when Lepine allowed the U. S. S.

> R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lepine may have acted as a loyal subject of the U. S. S. R., but he betrayed his trust to his employers. *Prima facie* the act of Lepine was wrongful. *Prima facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Prima facie* M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court."

So also with respect to the five members of the crew of the "Navemar" against whom this suit for possession *in personam* was brought. Whatever may have been their intention in depriving the owner of possession, their possession was for the petitioner here. The libellant below, the petitioner here, paid their wages—see the decree (R., pp. 327, 328). It is submitted that when the Circuit Court of Appeals decided that constructive possession is sufficient, its decision was in conflict with the weight of authority, and in conflict with the decision of this Court in the case of *The Davis,* 10 Wall. 15, where this Court (at p. 21) said:

> "But what shall constitute a possession which, in reference to this matter protects the goods from the process of the court? The possession which would do this must be *actual possession,* and not that mere *constructive possession* which is very often implied by reason of ownership under circumstances favorable to such implication." (Italics ours.)

III.

The decision below that a decree of confiscation is effective when the property confiscated is within the territorial limits of another sovereign and in the possession of its owner there, is contrary to international law as generally understood and applied by the other maritime nations.

In England, in *The Jupiter No. 3* (1927), Probate 122, it was squarely held that such an edict does not affect property outside of the territory of the confiscating power. At page 144 of the opinion of Mr. Justice Hill, it was said:

> "As to the second question—that is, the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the Jupiter was not within the territory of the R. S. F. S. R., I do not see how the mere passing of a decree could transfer the property.* This seems to me to be recognized in all the cases: see, for instance, per Atkin, *L. J.*, in *Gouksaaow's* case (1923) 2 K. B. 682, 693; per Sargant, *L. J.*, in *Sedgwick, Collins & Co.'s* case in the Court of Appeal (1926) 1 K. B. 1, 15; and per the Lord Chancellor in the latter case in the House of Lords (1927) A. C. 95. The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation." (Italics ours.)

Mr. Justice Hill's opinion was adopted *in toto* by the Court of Appeal. See *The Jupiter* (1927), Probate 250, at page 253, and at page 255.

The opinion in *The Jupiter* is in accord with the law of Belgium. See *Martiarena* v. *Amalibobeta and Urutia,* reported in the Rechtskundig Weekblad (Weekly Law Gazette, published at Antwerp) in the issue of March 7, 1937. We annex a copy of a translation of that opinion as an appendix to this brief. The law of the Netherlands appears to be the same. See *German Reich* v. *Merzbach, et al.* (1925) (Netherlands) Weekly Law Journal, No. 11440 (published at The Hague). That case involved the title to some rafts which had been exported from Germany in violation of German law, which provided that no goods could be sent out of Germany without a proper export license, and further that, if they should be so sent out, the goods would be forfeited to the German Reich. The German Reich contended that as soon as the rafts left the German territory without the export license, they automatically became the property of the German Government. Notice of forfeiture was served upon the persons in possession of the rafts while the rafts were within the territorial jurisdiction of the Netherlands. In deciding the case, the Court said, without giving further reasons for its decision:

> "* * * as it is contended (by the German Reich) that title passed herein by virtue of the notice * * * its position involves a violation of the sovereignty of the State of the Netherlands, which does not permit that effect be given to the official notice served on behalf of the German Reich on Netherlands territory * * *."

In this connection also see

> *In re Russian Bank for Foreign Trade* (1933), 1 Chan. 745.

In Frankenstein on Conflict of Laws, Volume II, page 77, it is said:

> "The *lex rei sitae* on principle also governs the acquisition of title through an act of State." (Citing *The Jupiter* (1927) Probate 250.)

We submit that there is nothing in the recent case of *United States* v. *Belmont,* which requires a contrary conclusion. In that case the Russian Government took over and confiscated a Russian corporation, which had its situs in Russia. Consequently, when our Government recognized the act of the Russian Government in taking over the corporation as a legal act, then the property of the corporation involved, in that case a bank balance, became the property of the Russian Government. In the majority opinion in *United States* v. *Belmont,* the Court refers with approval to the judgment of Bankes, *J.*, in the case of *A. M. Luther* v. *James Sagor & Co.* (1921), 3 K. B. 532. The same judge, Bankes, *J. L.*, wrote the leading judgment in *The Jupiter No. 3,* (1927) Probate 250. He adopted the opinion of Hall, *J.*, below ((1927) Probate 122 at 140), where it is clearly stated that when property is beyond the jurisdiction of the confiscating power, the edict of confiscation is ineffective.

So far as we have been able to discover, the decision of the Circuit Court of Appeals, to the effect that a decree of confiscation is effective when the property confiscated is entirely outside of the territorial limits and jurisdiction of the confiscating power, and in the possession of its owner, is without precedent. We respectfully submit that this question, which has been decided by the Circuit Court of

Appeals in conflict with the laws of other leading maritime powers on the same subject, should be reconsidered by this Court. It is indeed a novel doctrine to say that when a vessel is in foreign territorial waters she is subject to confiscation by the Government of her flag. On a subject such as this our law should not be permitted to vary so greatly from that of other maritime powers. *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487.

IV.

(a) Luis Careaga, who made the suggestion, was alleged to be an Acting Consul General of Spain. As such he was without authority to make any representation whatever on behalf of the Republic of Spain.

(b) The question whether or not Careaga was clothed with a diplomatic function was a political question and not a judicial question, and in the absence of a decision on that question by the political department of the Government, the Court should have disregarded the application of Careaga.

(a) It has long been settled by decisions of this Court that a Consul as such is not clothed with authority to act as a diplomatic agent of his sovereign. See *The Anne,* 3 Wheat. 434, at 445, where this Court, speaking through Mr. Justice Story said:

> "And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office con-

fers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed. It is admitted, that a claim by a public minister, or, in his absence, by a *charge d'affaires,* in behalf of his sovereign, would be good. But in making this admission, it is not to be understood, that it can be made in a court of justice, without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment."

Recently in the case of *The Sao Vicente,* 260 U. S. 151, this Court took occasion to quote much of the foregoing language and to approve it.

(b) In the present case, after making his first application, which was denied, Careaga filed a certificate stating that a Power of Attorney, clothing

him with diplomatic power to act for the Republic of Spain in the matter of claiming the S. S. "Navemar", was lodged in the Embassy of Spain at Washington. This certificate is signed by the Counsellor to the Embassy and is certified by Careaga and the Counsellor to the Consulate. No certificate or statement of any kind has been made by any political officer of the Government of the United States as to Careaga's status. Under these circumstances we submit that the court should disregard Careaga, for the reasons set forth in *The Anne, supra.* Proof of delegation of special diplomatic authority should be made to the political department and until such proof is made Careaga cannot be considered as being clothed with diplomatic authority. See *Doe ex dem. Clark* v. *Braden,* 16 How. 645, where this Court held that it was for the Executive Department of the Government rather than for the Judicial Department, to determine who represents a foreign government. See also *Terlinden* v. *Ames,* 184 U. S. 270.

In *State of Russia* v. *National City Bank of New York,* 69 F. (2d) 44, the Circuit Court of Appeals for the Second Circuit said:

> "As to the authority of Foreign Commissar Litvinoff to make the assignment on behalf of his government, there is a presumption of authority in his designation, recognition, and the President's acceptance of the assignment. It is a matter of political action in foreign affairs, and *the question of who represents and acts for a sovereign or nation in its relation to the United States is determined, not by the Judicial Department, but exclusively by the political branch of the government. Lehigh V. R. Co.* v. *State*

of Russia, supra; Doe ex dem. Clark v. *Braden,* 16 How. 635, 656, 14 L. Ed. 1090; Hyde on International Law, Vol. -, p. 368; *Terlinden* v. *Ames,* 184 U. S. 270, 288, 22 S. St. 484, 491, 46 L. Ed. 534." (Italics ours.)

See also *Agency of Canadian Car & Foundry Co.* v. *American Can Co.,* 258 Fed. 363, where the Circuit Court of Appeals for the Second Circuit said (pp. 368-369):

"In the same way the question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the political branch of the government. *In re Baiz,* 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof. And the certificates of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian Supply Committee, must be regarded in like manner as an authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates."

CONCLUSION.

Because the decision below is on important questions of maritime and international law and is in conflict with the great weight of authority, with the applicable decisions of this Court, with the decision of the Circuit Court of Appeals for the Fourth Circuit, and with the decisions of the courts in other maritime countries, we respectfully submit that a writ of certiorari should be granted in order that these questions may be definitely and finally decided in this country.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
JAMES W. RYAN,
Proctors for Petitioner.

APPENDIX A.

Martiarena v. *Amaliobeta*

RECHTSKUNDIG WEEKBLAD (WEEKLY LAW GAZETTE)

7th March 1937, No. 25, 1065

CIVIL COURT OF ANTWERP

2nd Chamber (bis) 18th February 1937.

President: A. Stellfetd. Judges: Van Mieghem and Jageneau.

Pl. R. Van de Vorst against A. Lilar.

International private law. Claiming of ships by the Spanish government. Conditions of validity in accordance with Belgian international private law.

Two ships which left a Spanish port took refuge at Antwerp. They were claimed there by their owner and chained up. Against this claim it is pleaded that they are said to be regularly requisitioned by the Spanish authorities. Is this requisition valid for Belgian law?

The judgment decides that in order that the requisition should be valid it should be proved that all formalities prescribed by the Spanish law have been duly complied with, among others, the registration in the register with serial number provided for by the law, with the making out of an inventory of the ships and the handing over of regular proof of dispossession. All other prescriptions of the Spanish law would be in conflict with Belgian public order

Martiarena against Amaliobeta and Urutia.

Whereas the summons of commitment for trial dated the 20.10.36 extends to it being pleaded as right that the plaintiffs shall again be given possession of the ships Alkari and Lagundu and that the defendants be ordered to evacuate these vessels;

Whereas these, favoured by political disturbances, left the port of Pasajes on 2nd September 1936 in order to

moor at Antwerp, after having experienced difficulties with the competent authorities of the port of Ostend where they had put in, and to be there chained at the instance of the plaintiff;

Whereas it is no longer disputed or can be disputed that the Alkari and Lagundu are the property of the plaintiff and that the documents of ownership produced amply proved this right, the claim is therefore admissible;

Whereas the right of ownership in Spain, notwithstanding the serious events which that country is experiencing, still always remain a fundamental legal principle;

Whereas however Urutia and Amaliobeta, in order to justify the taking possession, invoke a requisition disputed by the plaintiff;

Whereas, in these circumstances, the crucial point of the action is in the examination of the validity of this claim in respect not only of Spanish law but also of Belgian international public order;

Whereas the defendants base their defence mainly on a document dated 2nd September 1936, bearing as heading "Secretariat of Guipuzcoa" and signed by the direction of the Junta and the popular front of Guipuzcoa and by the popular front of the same province, and in which it is stated that the two fishing vessels are "entrusted for the service of defence to the Basque armies of Azpeitia";

Whereas it is thus necessary to find what provisions the Spanish law affects in the present matter, and to what extent these are to be observed in order, in the case of non-application of the essential conditions of a regular requisition, to consider these as not existing and of no value;

Whereas the latest Spanish fundamental law, in art. 44, proclaims ownership and provides for dispossession of same only for reasons of public need but with fair compensation;

Whereas this principle is confirmed in the regulation made by the Ministry of War on the 21.8.1921 (Gazette of Madrid No. 237 of 25.8.21) and by application of the law of 29th June and 11th December 1918;

Whereas, moreover, every application gives right to compensation for the requisitioned objects, and after a written order given in advance (art. 4) which states the nature and duration of the operation, all of this subject to immediate issue of a written acknowledgment of receipt of the requisition;

Whereas this procedure agrees with that of all civilized countries, both in war time and in times of peace, and has

found its inception in the common law of the peoples; whereas these fundamental principles cannot be interfered with by the lawful government of Valencia, as it, as custodian of legality, must be the first, even in time of civil war; to make the application thereof unassailable;

Whereas only a summons made in accordance with the stipulations of the law can give the owner of the requisitioned objects the right to obtain compensation for them, which he may rightly demand;

Whereas the Belgian courts must regard all other expropriations committed outside of the law as having been effected by force and, consequently, as in violation of the natural right of ownership proclaimed by the fundamental Belgian law, and all foreigners in the Kingdom's territory as protected against all reprisal;

Whereas it is not contended that the known declaration made by the political associations was recorded with a serial number in the register specified by the law; whereas it does not give the slightest guarantee as to the date which it bears;

Whereas no inventory of the ship was made either, nor an acknowledgment of dispossession handed over to the plaintiff, so that the latter, for the safeguarding of his rights, is exposed to all arbitrariness, and for eventual later compensation cannot invoke the least legal title;

Whereas any other declaration of the Spanish law would no longer coincide with the Belgian, and with the presence of the property in the Belgian jurisdiction, for the sake of unity of the country's legislation, no other application of this would be possible than that which would allow the plaintiff to claim his property in such circumstances;

Whereas moreover it must be set forth that for the very first time, in a previous action brought before the President of the Commercial Court, and after pronunciation of his order dated the 27.10.36, defendants, holding the opinion that this had not yet been given, made mention for the first time of a requisition;

Whereas, in this connection, it must also be mentioned that the two captains declared at Antwerp before the Water Bailiff that they had put in there through bad weather and to wait for orders from the owner;

Whereas they were unable to produce any title of ownership of their ship, such as art. 63 of the law relating to navigation requires;

Whereas the Belgian Consul at San Sebastian tele-

graphed to the Ministry of Foreign Affairs at Brussels, that both ships left the port of Pasajes on 3rd September and were seized by their crew;

Whereas all these facts and declarations are peculiarly in conflict with the thesis of the plaintiffs;

Whereas, the plaintiffs indeed invoke a declaration by the Spanish embassy from which it would appear that, according to the Spanish law of 1st July 1911 (art. 47 and 65), the Ministry of Finance is not obliged in case of revolution to observe the usual legal formalities;

Whereas in this case it is a question of a legal dispute in the matter of public contracts which do not apply in the present action: whereas, moreover, the interpretation of the foreign law is for the Belgian court a question of fact subject to its sovereign judgment, and which must be in accordance with the national laws;

Whereas, therefore, and without deeper examination of the circumstances in which dispossession took place on the 2nd September, it is established from now onwards that it took place contrarily to the law, and without any observation of the least customary form of Spanish law;

Whereas the defendants invoke the decree proclaimed on the 25th July by the Spanish Government, and of which an extract through the Spanish Embassy in Brussels is to be found in the papers, but whereas this order applies only to chapter V of the law of 1st July 1911 for the administration and accountancy obligations of the public finance, and does not apply in this case;

Whereas the plaintiff rightly remarks that [they] could not put into Belgium for any military purpose, although according to the declaration of the political party "Popular Front" of Guipuzcoa, they have been requisitioned "entrusted to the Basque armies of Guipuzcoa for defence service";

Whereas the Spanish authorities, through the mouth of their representatives in Brussels, mitigated these motives by informing the Minister of Foreign Affairs of Belgium in a note that the Alkari and Lagandu intended to leave the port of Antwerp without cargo, with their papers in order, quod non, and the declaration that they had to secure provisions for Bilbao;

Whereas, from these considerations, it appears that no regular requisition existed at the moment when the said ships left Spanish waters in order to take refuge in Belgium;

Whereas the defendants invoke a telegram dated the 22nd October 1936 in which the Spanish Minister of Foreign Affairs is said to approve the requisitioning of the ships on the 2nd September;

Whereas this act of the Spanish Authorities, taking place ex postfacto cannot acquire any validity in respect of what was, ab initio, in accordance with its own laws, entirely invalid, all the more so as on the date of the telegram there could be no question of a new requisition, as the ships had become beyond the dominion of the Spanish government;

Whereas, therefore, if it is asserted that an official declaration of a foreign Minister must be taken as the truth, this applies however only in as far as this declaration relates to an action in which the foreign state is itself concerned, either direct, or indirectly, quod non;

Whereas therefore the defendants are, as for themselves and theirs, without any right to the ships of the plaintiff, whereas in addition it is found that the plaintiff is the owner of the ships;

For these reasons:

The Court .....

All other .....

Declares the claim admissible and, as to the main matter, finds that the plaintiff shall be put back in possession of the ships Alkari and Lagundu;

Orders the defendants to free the aforesaid ships and to leave them and to place them at free disposal within eight days reckoned from the signing of this judgment, and in case of failure by the defendants to do so, authorises the plaintiff as from now and above all to then drive them and theirs out with movables and effects and to take proceedings publicly against the latter through the first bailiffs requested so to act;

Places on record for the defendants that, in virtue of the competence and instance, they each assess the action at more than frs. 25,000 nd this in respect of each head.

Declares the judgment executable provisionally notwithstanding opposition or appeal and without security

Orders defendant to pay costs.

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Supreme Court of the United States

OCTOBER TERM 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

(Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant, through Consul Careaga and Proctor Rosenberg, by order to show cause, after final decree entered, why the decree should not be vacated so that he might be permitted to appear as claimant,

Respondent in this Court.

REPLY MEMORANDUM OF PETITIONER.

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No.....

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",
Petitioner,

—against—

(Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant, through Consul Careaga and Proctor Rosenberg, by order to show cause, after final decree entered, why the decree should not be vacated so that he might be permitted to appear as claimant,

Respondent in this Court.

REPLY MEMORANDUM OF PETITIONER.

The statement of facts in respondent's brief is inaccurate and in conflict with the findings of the District Court (R., pp. 258 to 271), which were not disturbed by the Circuit Court of Appeals. The District Court heard all the witnesses testify in open Court, and the appellate court would not of course

under well settled law disturb them. The District Court took the greatest pains in making its findings. Indeed, the Court supported each finding by specific reference to the substantial evidence supporting it (R., pp. 258 to 271). The citations given in respondent's brief show that counsel for respondent have ignored the findings below and have selected excerpts from the testimony of a few witnesses only as the facts in the case. The statement of facts printed on pages 2 to 13 of the petition is strictly in accord with the undisturbed findings of the District Court (R., pp. 258 to 271). The decision of the Circuit Court of Appeals turned on the questions of law whether an alien of a friendly nation residing in this country and in actual possession of his vessel or personal property here can lawfully be dispossessed of such property within the territorial limits of the United States by five of his own insubordinate employees; and whether an owner has the right to resort to the courts of this country to recover possession of his vessel from such insubordinate employees. Process of the court was served on these employees when the vessel was arrested *in rem*. No employee or representative of any foreign government was on board. The vessel had entered this country as a private merchant vessel belonging to such resident alien, and her character as such has remained unchanged. The Circuit Court of Appeals held as matter of law that a supposed "constructive" possession, short of actual possession, of a foreign government might result from a confiscatory order or decree of the foreign country, even though the vessel was within the territorial limits of another country, and that such constructive possession was legal justification for violent seizure of actual possession of the vessel from her private alien

owner within our territorial limits. The decision is anomalous because the seizure here was not by a foreign government but by a few of petitioner's own insubordinate employees. The uncontradicted evidence is that no representative of the Republic of Spain has ever been on board this vessel or has ever presented any credentials or authority to any of petitioner's officers or employees who alone have been on board her. The doctrine announced by the Circuit Court of Appeals is, we submit, without precedent, and, if accepted as law, would encourage resident aliens to resort to violent means of self help to protect themselves against seizure of their personal property in this country by their insubordinate employees.

The paragraph from the opinion of the Circuit Court of Appeals quoted at page 14 of respondent's brief, must be read in the light of the several undisturbed findings of fact by the District Court at pages 258 to 271 of the Record. When this is done, the unrepresentative and misleading character of the quotation, as connected by counsel for respondent (at p. 15 of their brief) with the District Court of New Jersey's opinion in *The Roseric,* is obvious. It is significant that counsel to support his argument was forced to feature a District Court opinion, which opinion, as pointed out (R., p. 336) by the Circuit Court of Appeals in their decision is in square conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909 (R., p. 332).

Point I at page 11 of respondent's brief that the Court was without jurisdiction, is inconsistent with Point IV at page 20 of his brief that "The issue before the Circuit Court was judicial".

Point II at page 14 of respondent's brief is an